92-1023

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS E. MORTON, JR.,
Petitioner

v.

SOUTHERN UNION COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 14, 1992

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QUESTIONS PRESENTED

1. Where the district court has subject matter jurisdiction due to a pendent claim, must courts of appeal review *de novo* district courts' determinations of state law?

2. On the breach of contract claim that resulted in a jury verdict for Morton, did the appeals court violate this Court's requirement of *de novo* review of state law determinations when (a) it failed to state that its decision is based on *de novo* review of Texas law with no deference to the district court sitting in Texas, (b) it prefaced the central legal doctrine with: "As we understand Texas law . . .," (c) there is no decision of the Supreme Court of Texas directly in point, and (d) it issued a non-published decision reserved for "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law . . .?"

3. In the circumstances outlined in Question 2, did the appeals court violate Rule 34(a), F.R.A.P., by refusing to permit oral argument?

4. On Morton's breach of contract and fraud claims, did the court of appeals improperly invade the province of the jury by failing to view the evidence in the light most favorable to Morton and to give Morton the benefit of all inferences which the evidence fairly supported?

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are listed in the caption. Southern Union Company's parent company is Metro Mobil CTS, Inc.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Thomas E. Morton, Jr. prays for a writ of certiorari to review the Opinion and Order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on July 31, 1992.

OPINIONS BELOW

The opinion of the court of appeals is unpublished. It is attached hereto (Petitioner's Appendix ("Pet.App.") at 1a). The Order of the Fifth Circuit denying Morton's Petition for Rehearing, issued September 14, 1992, is unreported and attached hereto. Pet. App. at 8a. The

district court's Opinion granting Judgment Notwithstanding Verdict on Morton's breach of contract claim is attached hereto (Pet. App. at 9a); the district court's directed verdict in the trial transcript is attached hereto. Pet. App. at 19a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendition of judgment. The decision for which review is sought was entered July 31, 1992. Pet. App. at 1a. Pursuant to this Court's Rule 13.1, the time for filing a petition for certiorari runs from the date of the denial of a petition for rehearing. The petition for rehearing was timely filed, and rehearing was denied on September 14, 1992. Pet. App. at 8a.

STATEMENT OF THE CASE

A. The May 18, 1988 Letter

Southern Union hired Tom Morton as its General Counsel and Vice President in 1981. In April, 1987, Frank W. Denius, Chairman, President, and Chief Executive Officer of Southern Union announced that Morton had been elected to the additional office of Executive Vice President and continued as General Counsel and Corporate Secretary of Southern Union. Denius recommended Morton for this promotion to the position of second highest corporate officer.

In the spring of 1988, Morton and Denius discussed changes that would be made when Southern Union relocated its corporate headquarters from Dallas to Austin, Texas. Pet. App. at 25a. Morton and Denius met several times about the proposed reorganization. *Id.* Denius, Morton, and Ron Endres discussed the table of organization; at Denius' request, Morton had prepared the letter agreement Endres received when he relocated to Austin in 1986 to become President of Southern Union's

Gas Utility Division. *Id.* Denius told Morton, "I want to make sure that you get the same deal that Ron got as far as benefits so why don't you get that letter and draft up something for me to look at." *Id.* Denius told Morton what the leter should contain; Denius told Morton he recommended to the Board of Directors that Morton would be President and Chief Operating Officer and that he (Denius) would continue as Chairman and Chief Executive Officer. *Id.* As Denius gave Morton this information, he told Morton he had made this recommendation to the Board in executive session. Denius told Morton that the Board had accepted his recommendation. Pet. App. at 28a. Morton believed his boss. *Id.*

The May 18, 1988 letter flowed from several lunch meeting where Morton and Denius had talked about the table of organization. Denius said he did not want to continue as CEO forever but that for the time being, that was a role he thought it would be best for him to occupy, and that Morton would be President and Chief Operating Officer; Denius explained that Mr. Endres would be Executive Vice President in charge of the Utility Operation and that he did not feel Endres, based on his training and experience, had the credentials to be CEO of a New York Stock Exchange listed company, that Endres did not have Morton's breadth of experience. Pet. App. at 28a.

Morton physically handed Denius the letter he had requested in Denius' office and stood next to and watched while Denius read and signed the letter. Pet. App. at 26a-27a. Morton testified that Denius, an attorney himself, "had always been very careful about what he signed and was very meticulous and prided himself in that regard." Pet. App. at 27a. The full May 18, 1988 letter, signed by Denius and Morton, is in Appendix E. Pet. App. at 22a-23a. In it Denius states in part:

> It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you

> be named the President and Chief Operating Officer of Southern Union Company. As you know, your acceptance of this promotion will require a physical relocation for you to Austin, Texas area. In the meantime, substantial travel must be involved at an inconvenience to you but for the benefit of the Company.
>
> You, of course, are entitled tc all benefits under the Company's moving and relocation policy #113 subject to the following modifications:
>
> . . .
>
> With respect to the purchase of a new residence in the Austin, Texas area, the payment of points (up to three (3) points) on financing for the purchase shall be made by the Company.
>
> If the foregoing properly sets forth our understanding, please sign and return to me a duplicate copy of this letter which will serve as a memorandum of our mutual agreement.

Morton first discovered that Denius claimed he never recommended Morton as President to the Southern Union Board of Directors at Denius' deposition, after Morton filed suit. Pet. App. at 28a. Denius admitted he signed the May 18, 1988 letter (Pet. App. at 41a) but claimed that he did not read it before he signed it. *Id.* Denius has practiced law since May, 1949. Denius learned in law school to "think like a lawyer," took "Contracts," and covered the "four corners doctrine" under which a contract's meaning depends on what it says within its four corners. Pet. App. at 40a-41a. Denius testified: "Yes, sir, you're not supposed to isolate sections. You are supposed to read it in its entirety." Pet. App. at 41a. Denius admitted that he covered the concept of "offer" and "acceptance." *Id.*

Morton never received the promised promotion to President. *Id.* Although the letter states: "It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you be named the President and Chief Operating Officer of Southern Union Company,"

Denius testified the Board never voted on Morton becoming President and Chief Operating Officer of Southern Union. Pet. App. at 43a. Denius summed up: "The Board never did vote on it, and I never did recommend it to them." *Id.*

Morton would not have known that Denius failed to do what he told Morton orally and in writing he had done—that he had recommended and the Board had accepted his recommendation that Morton "be named the President and Chief Operating Officer of Southern Union Company." Morton testified the Board sometimes takes action that does not go in the minutes and does not require a formal resolution; that the Board could decide to do something in the future and not put it in the minutes; and that in many personnel matters, executive changes were not announced until after they actually took effect. Pet. App. at 36a-39a.

B. Events Following the May 18, 1988 Letter, Including Morton's Termination

After Denius signed the May 18 letter, he gave no clue that Morton should not rely on it. Two days after Denius signed the May 18, 1988 letter, on May 20, 1988, Denius and Morton signed an amendment to Morton's Severance Compensation Agreement, extending it until April 3, 1992. Pet. App. at 35a-36a. Morton then made several trips to Austin. Pet. App. at 31a. Because of the promise in the letter, he continued working for Southern Union, foregoing the opportunity to look for work elsewhere. Pet. App. at 31a-32a. As the second in command at Southern Union and its General Counsel, Morton was marketable before he was terminated. *Id.* Morton had acquired his house in Dallas in March, 1985 for $260,000. In October, 1988, Morton entered into a contract to sell his Dallas residence. Ownership was transferred on October 26, 1988 to a relocation company, with a sale price of $175,000. Pet. App. at 34a. Morton lost $56,000 on the house. *Id.* Morton testified he sold his house relying upon the

May 18, 1988 letter and the promise of being President of Southern Union. Pet. App. at 29a, 34a.

In the meantime, Southern Union moved ahead with its plan to relocate corporate offices to Austin. Denius signed a letter dated September 30, 1988 as Chairman, President, and Chief Executive Officer, addressed to Southern Union's landlord in Dallas, giving notice that "Southern Union intends to move its Dallas office operations to Austin, Travis County, Texas in the next few months." Pet. App. 32a. Denius enclosed a check to satisfy the lease termination provisions in the amount of $654,186.38. *Id.*

On February 17, 1989, Morton submitted a letter to Denius enclosing a copy of the May 18, 1988 letter and requesting an opportunity to discuss it and related matters. Pet. App. E. On February 20, 1989, Denius replied by memo, making no disavowal of having read or signed the promotion letter, and stating that Morton was "completely aware of the delays and the reasons therefor" in connection with the corporate move to Austin. Pet. App. at 24a.

By letter of March 28, 1989, Frank Denius advised Morton that if he did not resign before the close of business on March 29, 1989, he would be terminated. Morton turned down the resignation/severance compensation offer that was contingent upon execution of a release since he deemed it to be "basically unfair." Pet. App. at 30a. The separation package offered in Denius' March 28 letter provided for, *inter alia*, "reimbursement for loss on sale of Dallas residence." Pet. App. at 30a. Southern Union terminated Morton on March 29, 1989. Pet. App. at 29a.

C. The Trial

Jury trial commenced on April 1, 1991. Southern Union did not contend it had cause to fire Morton and did not request a "just cause" jury instruction or ques-

tion. At the conclusion of evidence, the trial court granted Southern's Motion for Directed Verdict on Morton's fraud claim on grounds that there was no reliance (the rationale accepted by the court of appeals) or damages.[1] The district court submitted three claims by Morton to the jury, including breach of contract as to the promotion letter signed by Denius and Morton, dated May 18, 1988 (R. 1085-1099).

The jury unanimously found in Morton's favor on breach of contract, that the May 18, 1988 letter constituted a written employment contract, that Southern Union's termination of Morton breached that contract, and that $1,850,000 would compensate Morton for Southern Union's breach of the May 18, 1988 contract if paid now in cash. Pet. App. at 47a-48a. The district court granted Southern Union's motion for judgment notwithstanding the verdict. Pet. App. at 9a. Despite having submitted fact questions to the jury on whether the May 18, 1988 letter constituted a contract and whether the termination was a breach of such a contract (Pet. App. at 47a), the district court viewed the contract claim as one with undisputed facts (Pet. App. at 13a) and ruled that Southern Union was entitled to judgment as a matter of law because under the Texas employment-at-will doctrine, an employer may breach a written agreement to promote with impunity unless the employee and the employer had a contract specifically denying the employer the right to terminate employment at will or setting forth a specific tenure of employment. Pet. App. at 16a-17a.

D. Decision on Appeal

In addressing Morton's breach of contract claim, the Fifth Circuit Court of Appeals treated the facts as undisputed. Pet. App. at 3a-6a. The appeals court did not

[1] The district court's ruling on Morton's fraud claim is set forth in full at Pet. App. D, 19a-20a.

acknowledge its duty under *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991), that a court of appeals must review the state law determinations of district courts *de novo* and that no form of appellate deference is acceptable. The court of appeals did not mention the decision of the Texas Supreme Court in *Hanks v. GAB Business Services, Inc.*, 644 S.W.2d 707 (Tex. 1983), that "a party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part." Nor did it acknowledge expressly that there was no decision of the Supreme Court of Texas directly in point. It prefaced the central legal doctrine under Texas law, a proposition that "[A]n employer's [written] promise merely to promote an at-will employee at an unspecified future date does not create [an express limitation on the employer's right to terminate employment at will] with the comment: "As we understand Texas law." Pet. App. at 5a. The court of appeals refused to permit oral argument and issued a non-published decision reserved for "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law . . . ." Pet. App. at 1a.

On Morton's fraud claim, the court of appeals did not mention the standard of review for directed verdicts, and held the district court was entitled to conclude the essential element of reliance was missing. Pet. App. at 6a-7a. The court of appeals did not acknowledge or discuss Morton's evidence supporting a finding of reliance, but instead stated: "Southern Union's evidence was that there was no Board approval and that Denius signed the letter without seeing the error there."

REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting Morton's Petition for a Writ of Certiorari. This Court, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure articulate rules of deference concerning jury findings, *de novo* non-deference for review of decisions of state law, and the safeguard of oral argument in cases of this kind. The Fifth Circuit's decision is in conflict with the Eighth Circuit's decision that *de novo* review is required for circuit court review of pendent claims and so far departs from the accepted and usual course of judicial proceedings and sanctions such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

Last year this Court resolved a conflict between the circuits in its landmark ruling that courts of appeals must conduct *de novo* review of district courts' determinations of state law where subject-matter jurisdiction in the district court is based on diversity of citizenship and that in such instances, no form of appellate deference is acceptable. *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991). In this case, where federal subject matter jurisdiction was based upon a pendent claim, the Fifth Circuit disregarded a jury verdict, denied oral argument, failed to conduct *de novo* review and deferred to the district court determination of state law.

In a single stroke, the Fifth Circuit has created (1) a new conflict between the circuits—on the issue of whether courts of appeal must review *de novo* district courts' determinations of state law where subject matter jurisdiction is conferred by a pendent claim and (2) a need for this Court to exercise its power of supervision to insure that the deference that was wide-spread before the *Salve Regina College* decision does not reemerge. This potential is real where the Fifth Circuit has failed to mention the standard of review, where its decision indicates that *de novo* review has not been conducted,

and where at least one other circuit has already misstated this Court's ruling in *Salve Regina* that "no form of appellate deference is acceptable," as a holding that an appellate court "need not defer to district court rulings on questions involving interpretations of state law." *Hand v. Matchett*, 597 F.2d 971, 974 (10th Cir. 1992).

In addition, on both Morton's breach of contract and fraud claims (disposed of by the district court by J.N.O.V. and directed verdict respectively), the Fifth Circuit violated fundamental principles of deference—deference of the court to jury findings. Rule 50(a)(1), F.R.C.P., and this Court, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404 (1962), require district courts and the courts of appeals to view the evidence in the light most favorable to Morton and to give him the benefit of all inferences which the evidence reasonably supported. The district court and the Fifth ciruit deprived the jury of its proper role and Morton of the standard of review to which he is entitled.

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE EIGHTH AND FIFTH CIRCUITS ABOUT WHETHER *SALVE REGINA COLLEGE* APPLIES TO REVIEW OF COURTS OF APPEALS OF ALL DISTRICT COURT DETERMINATIONS OF STATE LAW ISSUES REGARDLESS OF WHETHER THEY ARISE IN DIVERSITY OR AS PENDENT CLAIMS.

This Court should grant review for essentially the same reasons and to finish the task it began when it granted review in *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991). Insuring *de novo* review as opposed to some form of deference for determinations of state law is equally important whether the district court has jurisdiction because of diversity or a pendent claim. *See generally*, Coenen, To Defer or Not to Defer: A Study of Federal Court Deference to District Court

Rulings on State Law, 73 Minn. L. Rev. 899 (1989). The Court's *Salve Regina College* decision did not expressly decide the standard of review where the district court has jurisdiction due to a pendent claim.

The Eighth Circuit has expressly concluded that *Salve Regina College* applies to appellate review of all district court determinations of state law issues, whether they arise in diversity or as pendent claims. *Paramount Pictures v. Metro Program Network*, 962 F.2d 775, 778, n. 6 (8th Cir. 1992).

The Fifth Circuit has expressly applied *Salve Regina College* in cases where the district court had subject-matter jurisdiction based on diversity of citizenship. *See, e.g., City of Arlington v. Federal Deposit Ins. Corp.*, 963 F.2d 79, 80-81 (5th Cir. 1992); *General Electric Capital Corp. v. Southeastern Healthcare, Inc.*, 950 F.2d 944, 948 (5th Cir. 1991); *City Public Service Board v. General Electric Co.*, 935 F.2d 78, 80 (5th Cir. 1991); *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 138-40 (5th Cir. 1991). In this case, where federal court subject matter jurisdiction was based on a pendent claim, not on diversity, the Fifth Circuit conducted "traditional" judicial review, deferring to the reasoning of the district court (Pet. App. at 4a-6a), failing to expressly discuss the holding the Supreme Court of Texas would reach if presented with this issue, and making no statement that his review as *de novo* with no deference to the district court's determination of state law.

There is a split in the circuits. Logic dictates that the reason the Fifth Circuit did not state that it was conducting de novo review pursuant to *Salve Regina College* is because it was not conducting de novo review. Where Morton's briefs, and indeed his Supplemental Statement Regarding Oral Argument (Pet. App. 51a), urged de novo review, logic dictates further that the Fifth Circuit chose against de novo review on purpose and because *Salve Regina College* was a diversity case and does not ex-

pressly forbid the Fifth Circuit's deference rule in this pendent jurisdiction case. As to any notion that the Fifth Circuit actually conducted de novo review in this pendent jurisdiction case, it is important to adhere to the reasoning expressed in *Salve Regina College*, *supra*, 111 S.Ct. at 1223. The Court rejected the argument "that the Courts of Appeals that claim to accord special consideration to the District Court's state-law expertise actually undertake plenary review of a determination of state law." *Id.* The Court "decline[d] the invitation to assume that courts of appeals craft their opinions disingenuously." *Id.* The same is true here—the Fifth Circuit did not actually undertake plenary review without saying so.

The Fifth Circuit stated no justification for its failure to apply *Salve Regina College* to the review of state law determinations of pendent claims. On the other hand, the reasoning of the Eighth Circuit on this question is persuasive:

> We conclude that *Salve Regina College*, 111 S.Ct 1217, applies to our review of all district court determinations of state law issues, whether they arise in diversity or as pendant claims. This is consistent with both the language and the holding of *Salve Regina College*, which are broad. It is also consistent with the logic used by the Court. The Court stressed that both the function and structure of the appellate courts are designed to allow more thoughtful consideration of questions of law. *Id.* at 1221. Deferential review, the Court points out, invites divergent development of state law among federal trial courts, even within the same state, creating a dual system of enforcement of state-created rights in which the substantive rule applied may depend on the choice of forum. *Id.* at 1222. We see so reason to distinguish between diversity jurisdiction and pendant jurisdiction. Such a distinction would only create a dual system of enforcement where the substantive rule applied may depend, not only the choice of forum, but on the jurisdictional basis on which the claim is before the court.

Paramount Pictures v. Metro Program Network, Inc., 962 F.2d 775, 778, n. 6 (8th Cir. 1992). A review of decisions of courts of appeals applying *Salve Regina Colleges de novo* review standard demonstrates that where the standard is articulated and applied, this Court's goal of accomplishing more thoughtful consideration of questions of law has been realized.[2]

II. THE IMPORTANCE OF *DE NOVO* REVIEW OF STATE LAW DETERMINATIONS WARRANTS AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO INSURE THAT COURTS OF APPEALS GRANT *DE NOVO* REVIEW WITH NO FORM OF JUDICIAL DEFERENCE.

The fundamental importance of the *de novo* review, with no form of judicial deference, and the importance of appellate court adherence to this standard announced in *Salve Regina College*, justify Court review where an appeals court is silent about the standard of review employed and where all signs indicate it employed some form of deference. It does not look like the Fifth Circuit conducted *de novo* review; if it did so, no one can tell.

We respectfully suggest that *Salve Regina College* was not written to permit the courts of appeals to conduct lesser forms of review of determinations of state law through the vehicle of silence—failing to state the

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[2] *See, e.g., MidAmerica Federal Savings & Loan Ass'n v. Shearson/American Express, Inc.*, 962 F.2d 1570, 1472 (10th Cir. 1992); *Liberty Mutual Ins. Co. v. Triangle Industries, Inc.*, 957 F.2d 1153, 1156 (4th Cir. 1992); *Oneida Tribe of Indians v. State of Wisconsin*, 951 F.2d 757, 760 (7th Cir. 1991); *General Electric Capital Corp. v. Southeastern Healthcare, Inc.*, 950 F.2d 944, 948 (5th Cir. 1991); *High v. Balun*, 943 F.2d 323, 325 (3d Cir. 1991); *Prince v. Rescorp Realty*, 940 F.2d 1104, 1107 (7th Cir. 1991) (Seventh Circuit comments: "The district court was not faced with an easy task"); *Blankenbaker v. McCook Public Power District*, 940 F.2d 384, 385 (8th Cir. 1991); *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 848 (6th Cir. 1991); *Garnac Grain Co., Inc. v. Blackley, et al.*, 932 F.2d 1563, 1569 (8th Cir. 1991).

standard employed so the parties can debate and wonder whether there was plenary *de novo* review or some form of deference. Indeed, shortly after it issued the *Salve Regina College* decision, this Court reversed the Eighth Circuit's unpublished decision affirming the Western District of Arkansas, because this was not the *de novo* review required now by this Court. *Parker Solvents Co., Inc. v. Royal Ins. Cos. of America*, 938 F.2d 185 (8th Cir. 1991, —— U.S. ——, 112 S.Ct. 40 (1991).

Before *Salve Regina College*, a majority of the courts of appeals, using a variety of phraseology, deferred (to one degree or another) to a district court's interpretation of the law of the forum state. *Salve Regina College*, 111 S.Ct. at 1220-21. Describing this pre-*Salve Regina College* situation, the Eighth Circuit stated:

> In previous cases such as this, we have deferred to the state law ruling of a federal court sitting in the state whose law controls, unless the ruling is fundamentally deficient in analysis, without a reasonable basis, or contrary to recorded state court opinion.

Ballard v. Northwestern National Life Ins. Co., 931 F.2d 513, 516 (8th Cir. 1991). The Fifth Circuit, in a post-*Salve Regina College* diversity decision, described the previous Fifth Circuit law as follows:

> *Salve Regina College* recently overruled our prior rule, by which we "customarily defer[red] to the district judge in a diversity case involving interpretation of the law of the state in which that judge sits. [citing authority]. Of course, we were " 'not bound by the district court's interpretation and [could] reverse the court if we believe[d] the court ha[d] incorrectly applied the state's law.' " [citing authority].

Parker Plaza West Partners v. Unum Pension and Ins. Co., 941 F.2d 349, 352, n. 5 (1991) (emphasis added).

The Fifth Circuit's *Morton* decision reveals a danger that with varying phraseology, the courts of appeals will revert to deference of one forum or another. The Tenth Circuit has already quoted *Salve Regina College*

for the proposition that "appellate courts need not defer to district court rulings on questions involving the interpretation of state law." *Hand v. Matchett, et al.*, 957 F.2d 791, 794 (10th Cir. 1992). The notion that the district court "need not" defer is directly contrary to this court's holding: "When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College, supra*, 111 S.Ct. at 1224.

The Tenth Circuit's misstatement of this Court's *Salve Regina College* holding is a variant of the now-overruled (at least in diversity cases) rule that the court of appeals was not bound by the district court's interpretation and could reverse if it believed the district court had improperly applied the state's law. *Parker Plaza West Partners v. Unum Pension & Ins. Co.*, 942 F.2d 349, 352, n. 5 (5th Cir. 1991), *citing Dean v. Dean*, 821 F.2d 279, 283, n. 4 (5th Cir. 1987).

The Fifth Circuit's technique in *Morton* constitutes a greater threat to the standard of appellate review required by *Salve Regina College*. On its face, the Fifth Circuit failed to acknowledge *Salve Regina College*, failed to expressly conduct *de novo* review, and made no statement that it did not defer to the district court's determination of Texas law. The Fifth Circuit red flagged its failure to conduct *de novo*, plenary review by refusing oral argument [3] and issuing an unpublished decision un-

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[3] Rule 34(a), F.R.A.P., insures that Oral Argument will be allowed unless:

> (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

The Fifth Circuit departed from the dictates of Rule 34(a), F.R.A.P. under these circumstances. The Fifth Circuit did not suggest Morton's appeal from j.n.o.v. and directed verdict rulings was frivolous, nor that "the dispositive issue or set of issues has been recently authoritatively decided. . . ." The facts and legal

der Fifth Circuit Local Rule 47.5 that pertains to opinions that "have no precedential value and merely decide particular cases on the basis of well-settled principles of law. . . ." Pet. App. at 1a.

A careful reading of the Fifth Circuit decision indicates plainly that the Fifth Circuit conducted "traditional" review, deferring to the district court determination absent proof by appellant Morton that the district court determination was expressly contrary to a published Texas case. The Fifth Circuit analysis did not find that the Supreme Court of Texas has ever held that an employer may renege with impunity on a written promise to promote, particularly where the employee has performed his part of the agreement. Morton had cited recent, well-reasoned rulings of the Supreme Courts of South Dakota and Virginia, and *Larson v. Kreiser's, Inc.*, 427 N.W.2d 833 (S.D. 1988), and *Sea-Land Service, Inc. v. O'Neal*, 297 S.E.2d 647 (Va. 1982).

The Fifth Circuit, however, made no determination of Texas law. It attempted to distinguish *Larson* (Pet. App. 4a-5a) and *Sea-Land* (Pet. App. 6a), and noted that no Texas case adopts *Larson*. Since no Texas case has ever rejected *Larson* or held that at will employment *is* an excuse to renege on a written agreement, the fact that no Texas case adopts *Larson* obviously is not dispositive

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arguments in this case are important and complex, as noted in two separate requests for oral argument by Morton to the Fifth Circuit. Pet. App. J and K. Oral argument may have significantly aided the decisional process to the extent that the Fifth Circuit would expressly acknowledge the requirement—or at least the issue—of *de novo* review of state law determinations. Oral argument may have contributed to a decision that deals with Morton's evidence and not just Southern Union's of a non-at-will contract and reliance as to Morton's fraud claim. Particularly where *Salve Regina College* requires careful consideration of questions of state law by the courts of appeals, a court of appeals violates Rule 34(a), F.R.A.P. when there is no directly in point decision of the state supreme court and it refuses to permit oral argument.

in a *de novo* review.[4] Deference analysis seeks an in point Texas Supreme Court decision contrary to the district court's determination of Texas law. The Opinion contained a disclaimer—its "understanding" of Texas law —a far different undertaking from plenary de novo review of Texas law:

> As we understand Texas law, an employer's promise merely to promote an at-will employee at an unspecified future date does not create [a limitation on the employer's right to terminate employment at will].

The doctrine of supposed Texas law was not followed with a single citation. Pet. App. at 5a. The Opinion did not state its "understanding" of whether Texas law permits an employee to sue for damages when an agreement to promote has been broken.

Employment rights are sufficiently critical to warrant federal and state legislation prohibiting various species of discrimination. *See, e.g.*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.* Employment is how most people pay their bills. Strong policy reasons would preclude an employer from tricking job applicants or existing employees with written "agreements" whereby the employer obtains benefits and the employee receives an illusory promise. Texas law does not manifest the hostility to written contract rights attributed to it by the Fifth Circuit's unpublished opinion. The Texas Supreme Court has expressly limited the at will doctrine with its ruling in *Sabine Pilot Service v. Hauck*, 687 S.W.2d 788 (Tex. 1985), that despite this doctrine, an "at will" employee may recover damages when fired for refusing to do something subject to criminal penalties. A careful and plenary review of Texas law would not result in a prediction that the Texas Supreme

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[4] Where the supreme court of a state has not spoken on a point, the task of the court of appeals is to predict the state supreme court's ruling. *Salve Regina College, supra*, 111 S.Ct. at 1220, 1224.

Court would expand the at will doctrine to excuse employers that breach written agreements to promote.

A plenary review of Texas law would show that:

(a) Under Texas law whether an employee is at will is irrelevant to enforcement of a written promise to promote.

(b) Under Texas law an employer has no right to enter into a written agreement to promote an existing employee in exchange for (1) his continued service and (2) work by the employee that is agreed to be detrimental to the employee and for the benefit of the company and then (3) after the employee performs his part of the agreement and sells his residence in reliance upon the agreement to relocate, to refuse to promote and, instead, fire the employee with impunity because of the "employment at will" doctrine.

(c) Under Texas law a promise to promote an existing employee is not unenforceable on the theory that the employer would have been free to fire the employee at will so long as it timed the termination to follow the promotion.

The Fifth Circuit discussion does not mention a single Texas case involving a promise to promote. It omits reference to *C.F. Southern Region, Inc. v. Marshall*, 787 S.W.2d 471 (Tex. App.—Houston [14th Dist.] 1990, no writ) (breach of contract verdict upheld where as a condition of employment the employee was to be promoted to vice president of his department after six months upon review of his performance and was not promoted). *C.F. Southern Region* shows that in Texas a promise to promote its enforceable; whether employment itself is "at will" is irrelevant. The Fifth Circuit misstates *Roberts v. Geosource Drilling Service, Inc.*, 757 S.W.2d 48 (Tex. App.—Houston [1st Dist.] 1988, no writ). *Roberts* does *not* merely apply to a promissory estoppel claim. *Roberts expressly* held that the promise that triggered *Ri*berts' reliance was a basis for refusing summary judg-

ment against Roberts' claim for anticipatory breach of contract. *Id.*, 757 S.W.2d at 51.

The May 18, 1988 letter is a written promise to promote in an employment context, and the jury found Southern Union breached the agreement when it fired Morton (and thereby finally failed to promote him as agreed). Had the Fifth Circuit focused on the May 18 agreement, and the legal question of enforceability of a promise to promote, it would have analyzed Texas decisions in which promises have been broken and the "at will" issue never comes into play. In Texas, where an employer makes an offer, the offer is accepted, and the employee undertakes performance, there is an enforceable contract. Breach triggers an action for the damages. This straightforward approach has nothing whatever to do with whether employment is "at will." *See, e.g., Lone Star Steel Co. v. Scott*, 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied). The Fifth Circuit discussion of these important questions omitted any inquiry as to whether the "at will" doctrine comes into play with a unilateral contract where an offer has been accepted by an employee and performance has begun. *See Cole v. Control Data Corp.*, 947 F.2d 313, 318 (8th Cir. 1991) (employer cannot evade obligation to pay for software development it promised to purchase on grounds that employment is at will).

The Opinion begins with a bizarre comment that "Morton did not assert a claim against Southern Union for failing to promote him." Pet. App. at 4a. The failure to promote was part and parcel of the termination and Morton asserted it from beginning to end. The jury charge expressly set forth Morton's contentions "that the May 18, 1988 letter contractually bound Southern Union to *promote* Morton to the position of President and Chief Operating Officer of Southern Union and that by discharging Morton Southern Union breached that promise." Pet. App. at 45a-46a. (emphasis added). Further, the instructions to Plaintiff's Third Claim: "Breach of Con-

tract" specifically recited the promise to promote. Pet. App. at 46a. The trial court submitted the issue to the jury and Southern Union did not appeal its wording. It was correct to query whether the termination breached the promise to promote since the jury could (and did) conclude that termination was the ultimate breach of the promise to promote—no promotion now or ever.

The promise to promote *and* Morton's acts pursuant to the letter agreement deprived Southern Union of "any excuse" for ceasing performance on the promotion promise, including the excuse of "at will" employment. The Opinion fails to acknowledge the Texas Supreme Court decision in *Hanks v. GAB Business Services, Inc.*, 644 S.W.2d 707 (Tex. 1983), involving a covenant not to compete. The Texas Supreme Court held that the seller's breach of a covenant not to compete did not excuse the buyer's obligation to pay the final installment due for the business purchased where the buyer had retained the assets of the business and chosen to treat the contract as continuing:

> A party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his on part.

Id. at 708. Likewise, the Opinion fails to address *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174 (5th Cir. 1991), where the Fifth Circuit upheld a ruling that a covenant not to compete (a species of employment agreement) that was unenforceable under Texas law because it contained no geographical area limitation rendered an entire employment severance agreement unenforceable and the covenant not to compete could not be reformed to impose a reasonable geographical area limitation. Sheline tried to enforce his former employer's promise to make severance payments but failed himself to comply with the covenant not to compete. The Fifth Circuit ruled:

> He frets that our decision might be understood to suggest that a promise to a covenant not to compete is

> excused *ab initio* from its obligations under the contract and *even if* the promisor abides (needlessly) by the covenant without knowledge that the covenant is unenforceable. Let us allay his fears.
>
> A promisee waives its right to rescind on a contract if it "elects to treat a contract as continuing." *Hanks*, 644 S.W.2d at 708. Thus, had Sheline abided by the terms of the severance agreement and refrained from competing, Dun & Bradstreet could not have refused to make the agreed upon severance payments on the ground that the covenant was unenforceable. Having treated the agreement as continuing and effective, Dun & Bradstreet would have been obliged to honor its part of the bargain.

Sheline, 948 F.2d at 179. Under *Hanks* and *Sheline* Southern Union was not excused from its promise to promote *ab initio*. The opinion suggests no rationale why the excuse of at will employment would count more to the Texas Supreme Court than the excuse of illegality rejected in *Hanks* and *Sheline*.

While *Hanks* should be dispositive, the recent, well-reasoned rulings of the Supreme Court of South Dakota and Virginia support Morton's argument. The Opinion makes a distinction without a significant difference that *Larson v. Kreiser's Inc.*, 427 N.W.2d 833 (S.D. 1988), involved an employer's promise to *hire* an employee for a particular position, while Morton was an existing employee. Pet. App. at 4a. The facts in *Morton* are much stronger: The promise to promote is in writing (not oral) and it specified travel to Morton's detriment and Southern Union's benefit. Pursuant to the agreement, Morton continued employment and sold his Dallas residence. There is no logical reason why the Texas Supreme Court would hold that a promise to hire a job applicant for a particular position should create non-at-will employment while a promise to promote an exising employee to a higher position, particularly where the existing employee changes his position pursuant to the agreement, would lack this result.

Moreover, the Virginia Supreme Court dealt with an *existing employee* in *Sea-Land Service, Inc. v. O'Neal*, 297 S.E.2d 647, 650 (Va. 1982). The employer promised O'Neal *while she was employed* that if she resigned her sales representative job, she would be given the teletype and messenger job. O'Neal did, and Sea-Land did not. The Virginia Supreme Court reasoned like the Texas Supreme Court in *Hanks*. The mere fact that Sea-Land *could have* terminated O'Neal at will, while she was still a sales representative or after it honored its promise to transfer O'Neal to the teletype-messenger job was irrelevant because it did not dimisss her this way.

> Instead, it promised her that, if she resigned from the one position, she would be employed in the other. This was an undertaking separate and apart from any contract covering the particular position involved and was not subject to any presumption of terminability at will that might have applied to such a contract. Once O'Neal performed her part of the bargain by resigning from the first position, Sea-Land became obligated to perform on its part and breached that obligation to her damage when it refused to employ her in the teletype operator/messenger position.

Id., 115 LRRM at 4245. Likewise, Southern Union fired Morton *before* keeping its promise to promote him to President.

Thus, the Opinion's speculation about Texas Law is unfounded under *Hanks*, *Larson*, and *Sea-Land*. The Opinion states:

> Moreover, the *Larson* rule confers little benefit on at-will employees in the absence of a specific limitation, because the employer could terminate the employee lawfully simply by waiting until shortly after the employee's promotion.

Pet. App. at 5a. In support of this proposition, the Fifth Circuit cites no Texas case, only lower court decisions from New York and Florida that conflict with the rationale of *Hanks* and *Larson* and the express holding of *Sea-Land*.

This is hardly the careful plenary review of Texas law, designed to accurately predict the holding the Texas Supreme Court would reach on this issue, envisioned and required by *Salve Regina College, supra*, 111 S.Ct. at 1221-22. Moreover, the Fifth Circuit did not avail itself of the certification option encouraged by this Court. *Salve Regina College, supra*, at 1224, n. 4. The Opinion in this case illustrates perhaps the ultimate wrong approach. In *American Waste and Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1395 (5th Cir. 1991), Judge Brown in dissent suggested, "When In Doubt, Certify" and stated:

> Floundering around, at best, in an effort to predict what the Supreme Court of Louisiana would do, we deny, not only to the parties but to the jurisprudence of Louiisana as well, the opportunity to obtain an authoritative answer to the problem facing this panel.

Id. at 1395. In *Morton*, the Fifth Circuit again declined the certification option. Worse still, it "punted" by disposing of the need to conduct plenary review of state court law to determine what the Supreme Court of Texas would decide on this issue with the disclaimer, "As we understand Texas law. . . ." Pet. App. at 5a. Where the Fifth Circuit does not expressly acknowledge its obligation to conduct *de novo* review and to avoid any form of judicial deference, this shallow form of judicial review results. It is important for this Court to exercise its supervisory powers to preclude the silent rejection of *de novo* review required by *Salve Regina College*.

III. IN AFFIRMING THE DISTRICT COURT'S JUDGMENT NOTWITHSTANDING THE VERDICT AS TO MORTON'S BREACH OF CONTRACT CLAIM AND DIRECTED VERDICT ON MORTON'S FRAUD CLAIM, THE COURT OF APPEALS FAILED TO INSURE THAT THE DISTRICT COURT DEFERS TO THE JURY WHEN IT COMES TO WEIGHING THE EVIDENCE AND THE INFERENCES TO BE DRAWN AND THE COURT OF APPEALS FAILED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO MORTON.

Another reason for this Court to exercise its power of supervision is to insure that the Fifth Circuit requires deference when deference *is* required (while it should *not* defer to district courts' state law determinations). Specifically, on both the breach of contract and fraud claims, because these were disposed of by judgment notwithstanding the verdict and directed verdict respectively, the court of appeals was bound to view the evidence in the light most favorable to Morton and to give him the benefit of all inferences which the evidence fairly supported, "even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404 (1962). It is the jury's function to weigh the evidence and the inference to be drawn therefrom and to come to the ultimate conclusion as to the facts. *Id. Continental Ore Co., supra*, at 696-97 concluded:

> From our examination of the rather extensive record, we have concluded that the court of appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to Continental's business.

The rule that the district court must, in effect, defer to the jury for fact finding (provided there is sufficient evidence) and that the courts of appeals must view the evidence in the light most favorable to a non-moving

party, is as fundamental to the accepted and usual course of judicial proceedings and to a litigant's appeal rights in the federal system as the rule articulated by this Court in *Salve Regina College, supra.* While a circuit court *must not* defer to the district court's determinations of state law, the district court and the circuit court *must* defer to the jury for findings of fact where there is sufficient evidence.

The court of appeals disregarded this rule (codified at 50(a)(1), F.R.C.P.) as to Morton's breach of contract and fraud appeals. On the breach of contract question, the Fifth Circuit acknowledged only a portion of the *Continental Ore Co.* rule:

> We review the district court's judgment notwithstanding the verdict to determine whether the record contains evidence that would cause reasonable jurors applying the proper legal standard to reach different conclusions. *Boeing Co. v. Shipman*, 411 F.2d 365-374 (5th Cir. 1969) (en banc).

Pet. App. at 5a. The Fifth Circuit then failed to address Morton's evidence that there was a contract and that the contract was breached. The Fifth Circuit apparently adopted the district court's reasoning that Morton's contract case turned on undisputed facts. Pet. App. at 13a. Morton produced evidence of negotiations and discussions about relocation to Austin and the May 18, 1988 letter itself which literally states that Morton's acceptance of the promotion would require him to physically relocate to Austin and engage in substantial travel at his inconvenience, but for Southern Union's benefit. The letter is in contract format, ending with the term "accepted and agreed." Morton also presented evidence that he had given up his opportunity to seek other employment while still employed as Southern Union's number two executive and General Counsel in a better employment market in order to remain employed by Southern Union to take advantage of the promotion promise Southern Union never fulfilled.

In Texas, whether there is a contract is generally a question of fact. *H.L. Scott v. Ingle Brothers Pacific, Inc.*, 489 S.W.2d 554 (Tex. 1972). The exception is "when undisputed documentary evidence shows that the parties intended to be bound and there is no legally sufficient evidence to the contrary. *Henry C. Beck Co. v. Arcrete, Inc.*, 515 S.W.2d 712, 716 (Tex. Civ. App.—Dallas 1974, writ dismissed). The district court submitted a jury question as to whether the May 18, 1988 letter constituted a contract. Pet. App. at 47a. In determining whether parties have formed a contract, an agreement may be implied from and evidenced by the parties' conduct in the light of the surrounding circumstances, including any earlier course of dealings. *Haws and Garrett General Contractor v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609-10 (Tex. 1972).

As to Morton's fraud claim, the Fifth Circuit's one-paragraph discussion (Pet. App. at 6a-7a) did not cite any part of the *Continental Ore Co.* rule nor the Fifth Circuit rule that it must view the evidence in the light most favorable to the nonmoving party, give the benefit of all reasonable inferences, and leave the function of weighing evidence to the jury. In stark contrast, the Fifth Circuit stated it agreed with the district court after noting, "*Southern Union's* evidence was that there was no Board approval and that Denius signed the letter without seeing the error there." (emphasis added). With disregard to Morton's evidence that the letter and its contents were not errors at all and that he relied upon the promise to promote, the Fifth Circuit weighed evidence when it determined that (meticulous attorney) Denius was telling the truth when he claimed he signed the letter without seeing the "error"—a proposition the jury found incredible. The jury heard and saw Morton and Denius testify about the circumstances of the reading and signing of the May 18 letter. Pet. App. 25a-28a, 40a-44a. The jury believed Morton and disbelieved Denius, thus resolving a swearing match with substantial evidence.

There was ample evidence for a jury to conclude that Morton could rely upon a written promise from his employer. Although Morton drafted the letter, Denius told him what to include; Morton watched Denius read it before signing. Denius never claimed he failed to read the May 18 letter or had made a mistake in it, despite the fact that Morton brought it specifically to his attention well before the termination date. Pet. App. E and F. Indeed, the jury could reasonably infer that Denius had Morton fired to *escape* the promise to promote. Morton testified he knew it was the Board's practice in personnel matters not to announce executive changes until they actually took effect. A jury could well have concluded that Morton reasonably relied on the written agreement, in contract form, from Southern Union's Chairman of the Board, President, and Chief Executive Officer.

The Fifth Circuit conducted its review of the district court's directed verdict on Morton's fraud claim in the same (and therefore erroneous) manner in which it reviewed the district court's determination of Texas law on Morton's breach of contract claim. After setting forth the district court's reasoning and the evidence that was favorable to Southern Union cited by the district court, the Fifth Circuit stated, "We agree." Pet. App. at 7a. The district court, under these circumstances, *should* have deferred to the *jury* that had sufficient evidence that Morton relied upon the written promise from Denius; the court of appeals should have applied the standard of review required by this Court in *Continental Ore Co. v. Union Carbide and Carbon Co.*, 370 U.S. 690, 696-97 (1962), and the court of appeals should not have, in effect, deferred to the district court's reasoning when the district court weighed the evidence, decided credibility and thus applied the improper standard in granting a directed verdict.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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